

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 29767
)	
MARYELLEN LANE)	BOARD DECISION
)	(Precedential)
From 1 step reduction in salary)	
for 6 months as an Associate Tax)	NO. 93-35
Auditor, Board of Equalization)	
with the Board of Equalization)	
at New York)	November 2-3, 1993

Appearances: Robert J. Stipe, Senior Staff Counsel, on behalf of the respondent, Board of Equalization; Maryellen Lane, pro per.

Before Carpenter, President; Stoner, Vice President; Ward, and Bos, Members

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in an appeal by Maryellen Lane (appellant) from a 1 step reduction in salary for six months as an Associate Tax Auditor, Board of Equalization at New York (BOE).

The salary reduction was imposed on the grounds that appellant had refused to take a previously scheduled flight to conduct an out-of-town audit. Her excuse for refusing to take the flight was that she was afraid to fly on the 12-seat aircraft because she believed she would become severely airsick. The ALJ sustained the salary reduction, finding appellant's "failure to notify her Supervisors in a timely fashion about her airsickness affected [BOE's] operations" and constituted "inefficiency and neglect of duty."

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The Board determined to decide the case itself, based upon the record and further argument submitted by the parties.¹ After a review of the entire record, including the transcript² and briefs submitted by the parties, the Board revokes the pay reduction in its entirety, for the reasons set forth below.

FACTUAL SUMMARY

The BOE appointed appellant an Auditor I in July of 1986. On July 14, 1987, appellant was appointed Tax Auditor II. In October of 1989, appellant was appointed Associate Tax Auditor.

At the time of the incident that formed the basis for the adverse action, the appellant was an Associate Tax Auditor working for the BOE in its New York District Office. She had been with the New York office for over four years. C. J. Kim (Kim) was appellant's first line supervisor.

As an Associate Tax Auditor, the appellant was responsible for completing Sales and Use Tax audits of out-of-state business entities doing business in California and owing California Sales and Use Tax. These audits are primarily conducted at the

¹Neither party requested oral argument.

²As appellant lives in New York, the hearing was conducted by telephone, by agreement of the parties. The case was decided by the ALJ based entirely on documentary evidence submitted by the parties prior to the hearing date. The BOE submitted declarations by appellant's supervisors, and appellant submitted a package of twenty-eight exhibits. Neither party objected to any of the evidence submitted.

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headquarters of the business entity being audited. In many instances, the businesses audited are located outside of the New York City area. The job specification for Associate Tax Auditor lists as a "Special Personal Characteristic" a "willingness to travel and work odd hours away from the office." The auditors for the Board's New York District Office are expected to complete their audits efficiently and with minimum disruption to the taxpayer's business.

On Friday, March 1, 1991, appellant submitted a proposed travel itinerary to her supervisor, Kim, for an audit to be conducted in Buffalo, New York. Appellant had scheduled the audit for the week of March 18-22, 1991. She requested an airline departure from Islip McArthur Airport to Buffalo on Sunday, March 17, 1991, so that she could begin the audit the following Monday morning. Islip is a small regional airport a short distance from New York City. Kim told the appellant he would look into the situation and let her know his recommendation on Monday, March 4, 1991.

On Monday, March 4, 1991, appellant called Kim from a taxpayer's office to report to him. At that time, Kim explained his research into available flight schedules and his recommendation that appellant take the 6:50 a.m. flight on Monday, March 18, 1991, from Islip to Buffalo. Appellant did not say anything negative or positive. She simply said "I see." Kim then stated that he would

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ask the secretary to order the ticket for that date and appellant responded "O.K." At the time of this conversation, neither Kim nor appellant was aware that the flight discussed was scheduled on a small, 12-seat aircraft.

The ticket was ordered and arrived in the office on March 6, 1991. Kim believed that a non-refundable ticket was purchased for the flight.

On Monday, March 11, 1991, appellant came into Kim's office and said she did not want to fly on the 6:50 a.m. flight from Islip on Monday, March 18, 1991. The reason she gave for not wanting to take the almost three hour flight was that the airplane was a small 12-seater and she was afraid she would become airsick on the airplane. Kim told appellant that she had suggested using Islip airport and he had previously informed her of the recommended flights on March 4, 1991, to which she had agreed.

Despite the fact that the scheduled flight was a week away, Kim made no effort on March 11 to ascertain whether the ticket could be exchanged. He simply told appellant the ticket was non-refundable and directed her to take the flight as scheduled. The appellant told Kim she did not order a non-refundable ticket nor did she care if the ticket was non-refundable. She stated to Kim that she was not going to take the flight and left Kim's office.

On Tuesday, March 12, 1991, the appellant discussed her travel arrangements for the Buffalo trip with Mr. Robert Bauer, (Bauer)

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Supervising Tax Auditor II. He was appellant's second line supervisor. She explained she was not comfortable flying on small planes, that she got airsick on small airplanes, and was worried the plane might have problems if the weather turned bad. Without checking into the feasibility of exchanging the tickets or the possibility of procuring a refund, Bauer told appellant that there was a penalty if the tickets were returned. Bauer directed appellant to take the flight as scheduled. He also contacted the District Administrator, Mr. James Caldwell (Caldwell), and agreed to have the tickets changed if Caldwell felt differently; however, Caldwell apparently agreed that appellant should take the flight as scheduled.³ The rationale given appellant was that other auditors had taken similar flights and that attempts would be made to accommodate her in the future. On Thursday, March 14, 1991, appellant filed a health and safety grievance over the dispute, which grievance was denied the following Friday morning on the same grounds stated by Bauer.

At 2:45 p.m. on March 15, 1991, the Friday before the Buffalo trip was scheduled to begin, appellant returned the airline tickets to Bauer and provided him with a letter from a physician, dated

³ In his declaration, Bauer states that, at the request of Caldwell, he did verify with the travel agency that the tickets were penalty tickets. There is no evidence as to the extent of the inquiry made of Omega Travel or whether the travel agency checked with the airline.

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November 20, 1989. The letter indicated appellant suffered from severe airsickness and recommended she refrain from traveling on small aircraft. Bauer questioned why appellant failed to mention the doctor's note earlier. Appellant indicated she was afraid to mention she had the letter as she was uncertain she would be able to find it. Bauer also advised appellant that he could not reverse the decision. Bauer informed appellant that, if she could arrange for a refund, she should do so, but she was expected to be on that plane on Monday morning.

Appellant did not take the March 18, 1991 flight to Buffalo. She went to the office instead. At the office, she presented a letter dated March 17, 1991 to Bauer from Long Island Medical Care Services. The letter stated appellant "had developed a phobia about flying in small aircraft and that, as a result, she develops severe anxiety, nausea, vomiting and other symptoms related to motion sickness." The letter further stated there was no treatment other than "avoidance" and recommended appellant not fly in small aircraft. Appellant also informed Bauer, in a memorandum dated March 18, 1991, that she had learned that a refund could be obtained on the ticket with submission of a doctor's note.

In December of 1991, the airline refunded the amount paid for the tickets for the March 18, 1991 flight to Buffalo. It did not assess a penalty for the return of the tickets.

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Appellant did eventually go to Buffalo, New York, on March 19, 1991. She took the flight in a larger airplane. She completed the audit which was the original reason for the trip by the original completion date. There was no evidence that there was any disruption to the client's business nor any repercussions whatever from the one-day delay in the start time.

As cause for issuing the Notice of Reduction in Salary, the BOE alleged that appellant violated Government Code §19572, subdivisions (c) inefficiency, (d) inexcusable neglect of duty, (e) insubordination, (o) willful disobedience, and (q) violation of board rule 172.

ISSUES

This case raises the following issue for our determination:

Do the facts establish cause for discipline under Government Code §19572, subdivisions (c) inefficiency and/or (d) inexcusable neglect of duty (e) insubordination, or (o) willful disobedience?⁴

DISCUSSION

Government Code §19583 provides, in pertinent part, that:

If the board finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action...

⁴ The charge of violation of Board Rule 172 is dismissed. [See Donald McGarvie (1993) SPB Dec. No. 93-06].

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The record does not support a finding that appellant's actions in connection with the flight scheduled for March 18, 1991 constituted sufficient cause for discipline. It is undisputed that neither appellant's supervisor nor appellant was aware on March 4, 1991, when they discussed the flight schedule over the telephone while appellant was out-of-town with a client, that the flight time selected meant appellant would be travelling on a 12-seat aircraft.

On March 11, 1991, when appellant was back in town and learned of the size of the aircraft, she notified her supervisor that she did not want to take the March 18 scheduled flight because the plane was a 12-seater and she felt she would be airsick. Rather than attempt at the outset to ascertain the extent of appellant's concerns and the possibility of exchanging the ticket, appellant's supervisor chose to take the rigid position that the ticket was non-refundable and that appellant would have to take the plane as scheduled.

Appellant made numerous attempts during the week between her learning of the size of the plane and the scheduled flight to persuade her superiors to allow her to take a different flight. She spoke to her second line supervisor, she filed a grievance, she eventually provided doctors' notes documenting the validity of her concerns, she contacted the airline and ascertained she could get a refund. Despite all of appellant's efforts to convince her superiors of her sincere distress at the prospect of taking a small

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plane, and her desire to fulfill her assignment by taking a different flight, appellant's supervisors and upper management insisted on attempting to force the issue rather than attempting to work with appellant to arrive at a mutually acceptable solution to the problem. The record is devoid of any evidence that any sincere effort was undertaken to investigate the options available that would have alleviated appellant's concerns while protecting the interests of BOE. In fact, if such effort had been undertaken, BOE might have learned as early as March 11 that the ticket in question was not non-refundable under the circumstances. Instead, a review of the exhibits and declarations submitted by the parties indicates that BOE involved no fewer than nine employees, and spent numerous hours at no little cost attempting to document a case against appellant and then litigating her appeal before this Board.

If there is any inefficiency in this case, such inefficiency is not attributable to the actions of appellant. Appellant made her concerns known to her supervisor as soon as she learned the facts giving rise to them, and pursued resolution of those concerns until the day of the scheduled flight through various means; appellant managed to schedule a flight to Buffalo to perform the audit in question the day following the scheduled start date, and to complete the audit within the original time frame. The BOE produced no record evidence to substantiate its claim that appellant was inefficient, insubordinate, willfully disobedient, or

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neglectful of her duty with respect to the audit in question. Neither did BOE establish that the client's business was in any way inconvenienced or disrupted by the delay in the start time of the audit. Appellant was justified in her conduct that formed the basis for this action. The salary reduction is revoked.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The 1 step reduction in salary for six months taken against Maryellen Lane is hereby revoked;

2. The Board of Equalization and its representatives shall pay to appellant all back pay and benefits that would have accrued to her had she not received a 1 step salary reduction for six months; and

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing of the written request of either party in the event the parties are unable to agree to salary and benefits due appellant.

4. This opinion is certified for publication as a Precedential Decision (Government code section 19582.5).

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THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, vice President
Lorrie Ward, Member
Floss Bos, Member

*Member Alfred R. Villalobos was not on the Board when this case was originally considered and did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on November 2-3, 1993.

GLORIA HARMON
Gloria Harmon, Executive Director
State Personnel Board